



U.S. Department  
of Transportation

**Pipeline and Hazardous  
Materials Safety Administration**

Office of  
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Dear Mr. Massen:

The Chief Counsel has asked me to respond to your application on behalf of AMTROL, Inc., for an administrative determination whether Federal hazardous material transportation law, 49 U.S.C. § 5101 *et seq.*, preempts the claim in a Missouri State court products liability lawsuit that the manufacturer of Department of Transportation (DOT) specification 39 compressed gas cylinders should have designed the cylinders to resist rusting over time and/or provided additional warnings of the potential hazard of rusting over time, beyond the requirements for the manufacture, marking, and labeling requirements for these cylinders in the Hazardous Materials Regulations (HMR), 49 C.F.R. parts 171-180.

Based on your application, it does not appear that the State of Missouri has yet adopted a specific requirement for the cylinder manufacturer to take these additional actions, either by law, regulation, or judicial decision. The Federal hazardous material transportation law sets forth circumstances under which that law preempts "a requirement of a State, political subdivision of a State, or Indian tribe." See 49 U.S.C. § 5125(a), (b)(1). That law also authorizes DOT to make an administrative determination "whether the requirement is preempted." 49 U.S.C. § 5125(d). It would be premature for the Chief Counsel to make a determination whether a potential requirement affecting the transportation of hazardous material, which has not yet been adopted or come into effect, would be preempted.

For this reason, we have declined to apply the formal administrative determination process to draft or proposed non-Federal laws or regulations. For example, we terminated a preemption determination proceeding and dismissed an application when we learned that the local ordinance at issue had never been adopted and never went into effect. PDA-3(RF), Chester, West Virginia Ordinance No. 305 Regarding Transportation of Hazardous Wastes, 59 Fed. Reg. 4962 (Feb. 1, 1994). Similarly, we terminated the proceeding and dismissed the

application after the city repealed its ordinance addressed in the application for a preemption determination. PDA-14(R), National Tank Truck Carriers, Inc. for a Preemption Determination as to Hazardous Materials Requirements Imposed by the City of El Paso, Texas, 61 Fed. Reg. 11677 (Mar. 21, 1996). In other proceedings, we did not address issues of preemption concerning a letter from the State governor unless the letter actually created a "requirement" within the meaning of the Federal hazardous material transportation law. Compare IR-7, New York State Letter from Governor's Designated Representative Advising Suspension of Spent Fuel Shipments, 49 Fed. Reg. 46635, 46636, with IR-9, Vermont Letter from Governor Concerning Highway Shipment of Spent Nuclear Fuel Through Vermont, 49 Fed. Reg. 46644, 46645 (Nov. 27, 1984). Similar considerations apply to the contentions of the parties in a private lawsuit, which the court may or may not accept.

At the same time, it may be helpful for me to provide additional background on the requirements in HMR regarding the manufacture and transportation of DOT specification 39 cylinders. This specification was added to the HMR in 1971 in response to a petition by the Compressed Gas Association. See the notice of proposed rulemaking (NPRM) at 35 Fed. Reg. 18879 (Dec. 11, 1970) and the final rule at 36 Fed. Reg. 16579 (Aug. 24, 1971). The final rule provided that a specification 39 cylinder "must be shipped in strong outside packagings" that "provide protection for the complete cylinder,"<sup>1</sup> and must be marked:

--"NRC" for "non-reusable container"; and

--with the statement that "Federal law forbids transportation if refilled" plus a statement of the maximum civil and criminal penalties applicable at the date of manufacture.<sup>2</sup>

In the NPRM, we emphasized "the nonreusable limitation of this specification" and stated that the cylinder would be "[o]verpacked at all times during transportation" and, because it was nonreusable, it would not be "subject to cyclic stresses resulting from refilling." 35 Fed. Reg. at 18879. Accordingly, specification 39 cylinders have always been intended for a single use; there has never been any intent that these cylinders have the strength or durability of cylinders manufactured to other specifications which are authorized for repeated refillings over many years and subject to periodic requalification through inspection and pressure testing. See 49 C.F.R. part 180, subpart C. The design and manufacturing requirements for these cylinders contemplate that they will never be refilled with a hazardous material.

Requirements affecting the design, manufacturing, and marking of a cylinder (or other packaging) marked as meeting a DOT specification must be distinguished from requirements affecting the use of that cylinder or other packagings. As discussed in our recent rulemaking on the "Applicability of the Hazardous Materials Regulations to Loading,

<sup>1</sup> Former 49 C.F.R. § 173.301(k)(1), as added at 36 Fed. Reg. 16580. The current requirement in 49 C.F.R. § 173.301(a)(9) provides that a specification 39 cylinder "must be packed in strong non-bulk outer packagings . . . marked with an indication that the inner packagings [i.e., the cylinder] conform to the prescribed specifications."

<sup>2</sup> Former 49 C.F.R. § 178-65-14(b), as added at 36 Fed. Reg. 16582. These marking requirements are presently contained in 49 C.F.R. § 178-65(i)(2).



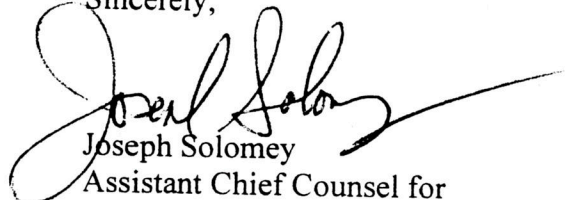
Unloading, and Storage," 70 Fed. Reg. 20018, 20024 (Apr. 15, 2005), "DOT specification packagings, such as . . . cylinders, are subject to DOT regulation at all times that the packaging is marked to indicated it conforms to the applicable specification requirements." This means that, "[u]nder the Federal hazmat law, a non-Federal entity may impose requirements on DOT specification packagings only if those requirements are substantively the same as the DOT requirements." 70 Fed. Reg. at 10024-25. See also 49 U.S.C. § 5125(b)(1)(E).

We would have a concern with any State law, regulation, or judicial decision that imposed additional manufacturing and marking requirements on any DOT specification packaging, including a specification 39 cylinder. It would be impractical and burdensome for a manufacturer of these cylinders to have to vary their design, manufacturing process, and markings to accommodate additional and possibly conflicting requirements that varied from State to State -- especially requirements for additional wording that indicates or implies that the cylinder is suitable for refilling with a hazardous material and continued use over many years, in conflict with the specific markings required by the HMR. These required markings are part of the safety requirements in the DOT specification for these cylinders and must not be compromised. Claims that the DOT specification is inadequate are properly raised in a petition to change the specification, in accordance with 49 C.F.R. §§ 106.95 - 106.105, rather than in a lawsuit that would impose additional manufacturing and marking requirements in only one State or local jurisdiction and disrupt the principle of national uniformity..

I express no opinion on the responsibility or liability of a person who loads, stores, or unloads a DOT specification 39 cylinder, or any other DOT specification packaging, that no longer meets the requirements of the DOT specification, when that packaging is no longer in transportation in commerce.

I hope this information is helpful. If you have further questions, you may contact me or Frazer C. Hilder of my staff at the above address or at 202-366-4400.

Sincerely,

  
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Hazardous Materials Safety Law

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